PUBLIC PROSECUTOR v. ONG HOCK THUAN

[A. Cr. J. (Azmi J.) October 18, 1962]

[Penang — Criminal Appeal No. 17 of 1962]

Road Traffic Ordinance, 1958, ss.92(1), 22(2) and 74(1) and (2) — Using private car as public service carriage without licence — Presumption under s.144(a) of the Ordinance — Meaning and interpretation of.

The respondent was charged under sections 22(2), 74(2) and 92(1) of the Road Traffic Ordinance, 1958. The learned magistrate acquitted the respondent on all three charges without calling on the defence after referring to the judgment of Ong J. in *Gan Chye Huat* v. *Public Prosecutor* [1] where the learned judge had said "there must at all times be adequate ground work before applying the presumption, otherwise every private vehicle owner will be presumptively guilty of an offence under section 92(1) every time he carries in his car any passenger not related to him." The Public Prosecutor appealed.

Held: (1) as there was evidence in this case that the vehicle licensed for private use only was carrying passengers the presumption in section 144 applies and the magistrate should have called upon the respondent to make his defence on the first charge. *Public Prosecutor* v. *Mohd. Yunus* [2] followed;

(2) the presumption in section 144 only applies to offences under Part V of the Ordinance and would not apply to the 2nd and 3rd charges as they refer to offences in other parts of the Ordinance.

Judgment of Ong J. in *Public Prosecutor* v. *Mohd. Yunus* [2] (unreported) approved. *Gan Chye Huat* v. *Public Prosecutor* [1] not followed.

[**Editorial Note:** *Public Prosecutor* v. *Mohamed Yunus, supra,* (unreported) was an appeal against the acquittal of the respondents, without the defence being called, in Summons Cases Nos. 134, 135, 136, 137, 138 and 139 of 1960 in the Magistrate's Court at Sabak Bernam. The respondents were the driver and owner of a motor-car (M. 2015) licensed for private use only, and the charges against them respectively were for using and permitting the user of the said vehicle in contravention of sections 92(1), 22(2) and 74(1) of the Road Traffic Ordinance, 1958. They were tried together in three separate trials, each on three charges.

Ong J. dismissed the appeal in Summons Cases 134 and 137, Summons Cases 135 and 138 for the simple reason that the prosecution evidence was unsatisfactory, but set aside the order of acquittal in Summons Cases 136 and 139 and ordered a re-trial before a different Magistrate on the following grounds:

(a) His Lordship was clearly of the opinion that the Magistrate was wrong in law in holding that the presumption under section 144(a) of the Road Traffic Ordinance, 1958, did not apply on the evidence adduced by the prosecution. A presumption is a rule of law that courts and judges shall draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved. Section 144(a) provides that "in so far as it may be necessary to establish the offence charged it *shall be presumed* until the contrary is proved that any conveyance of persons or goods in a motor vehicle was for hire or reward." Evidence that a vehicle licensed for private use only was carrying passengers or goods is sufficient to raise the presumption which the persons charged must rebut. The Magistrate was therefore not at liberty to brush off an express provision an Act of Parliament as not binding on him.

(b) The presumption is raised not only upon proof of conveyance of passengers but also of goods. In this case goods were conveyed as well as passengers, so that the Magistrate's arguments fell to the ground in any event as far as the conveyance of goods was concerned.

(c) After the close of the prosecution the Magistrate adopted a course of action for which there is no authority under the Criminal Procedure Code. The record showed that the Magistrate called four persons who on the Magistrate's inquiry said that none of them paid any fares to defendant No. 1. They said that they obtained a lift in defendant's car and that they knew defendant personally for a long time. The Magistrate thereupon recorded that he considered that it would be a waste of time to call on the defendants to answer the charges against them. His Lordship pointed out that these men were not affirmed and what they said, in answer to the informal inquiry by the Magistrate, was not evidence, and should have been disregarded. Moreover, the defendants should have been called on to elect whether they wished to give evidence or not before the Magistrate embarked upon the inquiry as he did.

(d) The evidence adduced by the prosecution clearly proved the offences charged in the absence of satisfactory evidence in rebuttal. The decision of the Magistrate was therefore clearly against the weight of evidence.

His Lordship stated in conclusion that he would recall to Magistrates what was said by Horne J. in *Public Prosecutor* v. *Long bin Abdullah* [1941] M.L.J. 54:

"Magistrate should note that insurers when granting a policy to an owner against third party risks stipulate for a particular user of the vehicle, i.e. a lower rate of insurance is paid for private cars than for public service vehicles and goods carriers. If a vehicle insured as a private car carries passengers for reward and an accident happens when the private car is so being used, the insurer is entitled to and will treat the policy as void. The insured passengers will get nothing but what they can recover from the owner. The offence is therefore of much greater danger to the public than it may at first sight appear. And it is because of this danger that the legislature has thought fit in some degree to throw a burden of disproof upon the accused. Moreover, those persons who take out proper licences and pay for adequate insurance are entitled to protection from unfair and dangerously illegal competition."].

Cases referred to:—

(1) *Gan Chye Huat* v. *Public Prosecutor* [1962] M.L.J. p. 27.

(2) *Public Prosecutor* v. *Mohamed Yunus,* K.L. Criminal Appeal No. 65 of 1960.

(3) *Croxford* v. *Universal Insurance Co.* [1936] 2 K.B. 253, 280.

(4) *Barrell* v. *Fordree* [1932] A.C. 682.

(5) *Warburton* v. *Loveland,* 5 E.R. 499 at 506.

MAGISTRATE'S CRIMINAL APPEAL.

Wan Sulaiman bin Pawan Teh (Deputy Public Prosecutor) for the appellant.

David Choong for the respondent.

Cur. Adv. Vult.

Azmi J.: This is an appeal by the Public Prosecutor against the judgment of the learned Magistrate at Penang acquitting the respondent on the following three charges:—

"1. That you at about 7.10 a.m. on 19.3.62 at Residency Road, Penang, being the driver of motor vehicle No. P. 4611, did use the said motor vehicle on a road as a public service vehicle without there being in force in respect of such motor vehicle a *valid licence* granted under Part V of the Road Traffic Ordinance, 1958, and you have thereby committed an offence against section 92(1) of the said Ordinance, punishable under the same section.

2. That you, at the same time, date and place did *use the said motor vehicle on a road for the purpose not included in the licence in force,* to wit for the conveyance of persons for hire or reward, for which purpose the fee chargeable in respect of the licence is higher than the fee chargeable in respect of the licence in force, and you have thereby committed an offence against section

22(2) of the Road Traffic Ordinance, 1958, punishable under the same section.

3. That you, at the same time, date and place did use the said motor vehicle on a road without there being in force in respect of such use *such a policy of insurance* or such a security in respect of Third Party Risks as complies with the requirements of Part IV of the Road Traffic Ordinance, 1958, and you have thereby committed an offence against section 74(1) of the said Ordinance, punishable under section 74(2) of the said Ordinance."

The learned trial Magistrate acquitted the respondent without calling on the defence.

The facts for the prosecution may be summarised as follows. The police had been keeping observation on a motor car bearing registration number P. 4611 for the period 14th February to 14th March, 1962, at the Residency Road Girls' School.

On the 19th March, 1962, at about 7.10 a.m., A.S.P. Gurmukh Singh (P.W.1) in the company of the Registrar and Inspector of Motor Vehicles (P.W.2) was at a place directly opposite the school on the Residency Road. They then both observed P. 4611 coming along Residency Road from the direction of the round-about. A.S.P. Gurmukh Singh stopped the car, which was driven by the respondent. In the car were 9 school children. The respondent was taken to the Police Station for interrogation.

P.W.2, P. Rajaratnam, said that he was present at the Residency Road on the day in question and he saw the car, P. 4611, going into the Residency Road Girls' School with children. He seized the car under section 92(1) of the Road Traffic Ordinance, but subsequently released it on the condition that it was to be produced in Court whenever required in writing by the Road Transport Officers. He also identified the respondent as the person driving it. That car was covered by an insurance policy as a private vehicle.

The evidence of observation was given by Baharum (P.W.3), who said that he kept observation on the car, P. 4611, for 14 days from the 14th February to the 5th March, 1962. Each day he kept three observations, namely, at 6.30 a.m., at 12.30 p.m., and at 6.30 p.m. On the various days during the period he had seen school children being conveyed in car P. 4611. The car would leave the children in front of the school and come out through the "out" gate. He could not, however, recognise the person or persons driving the motor car.

The learned Magistrate, in the course of his judgment, referred to the judgment of Ong J. in the case of *Gan Chye Huat* v. *Public Prosecutor* [1].

In that case, Ong J. held that the mere fact of the carrying of two passengers by the appellant in his car is not sufficient to raise the presumption under section 144(a) of the Road Traffic Ordinance, 1958. The learned Judge held the view that "there must at all times be adequate ground work before applying the presumption, otherwise every private vehicle owner will be presumptively guilty of an offence under section 92(1) every time he carries in his car any passenger not related to him."

The learned Deputy Public Prosecutor, however, referred me to another judgment of the same learned Judge in Kuala Lumpur High Court Criminal Appeal No. 65 of 1960 (*Public Prosecutor* v. *Mohamed Yunus* [2]) on the meaning and interpretation of the same paragraph (a) of section 144. Ong J. said in that case as follows:—

> "I would emphasise that a presumption is a rule of law that Courts and Judges shall draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved. Section 144(a) provides that 'in so far as it may be necessary to establish the offence charged it *shall be presumed* until the contrary is proved that any conveyance of persons or goods in a motor vehicle was for hire or reward.' Evidence that a vehicle licensed for private use only was carrying passengers or goods is sufficient to raise the presumption which the persons charged must rebut. The learned Magistrate is not at liberty to brush off an express provision in an Act of Parliament as not binding on him."

The learned Deputy Public Prosecutor referred me to a passage in the judgment of Scott L.J. in the case of *Croxford* v. *Universal Insurance Co.* [3]:—

> "Where the words of an Act of Parliament are clear, there is no room for applying any of the principles of interpretation which are merely presumptions in cases of ambiguity in the statute."

He also cited to me a passage from the judgment of Warrington L.J. in *Barrell* v. *Fordree* [4]:—

> "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive, if possible, at their meaning without, in the first place, reference to cases."

In my opinion, section 144 of the Road Traffic Ordinance, 1958, very clearly say that:—

> "144. In any proceedings for an offence under Part V of this Ordinance, in so far as it may be necessary to establish the offence charged, it shall be presumed until the contrary is proved —
>
> (a) that any conveyance of persons or goods in a motor vehicle was for hire or reward;"

I would also refer to a passage in *Warburton* v. *Loveland* [5], where it says:—

> "Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences; for in that case, the words of the statute speak the intention of the legislature."

I would, therefore, say with respect that I agree with the opinion of Ong J. in *Public Prosecutor* v. *Mohamed Yunus* (unreported), K.L. High Court Criminal Appeal No. 65 of 1960, but not with his judgment in *Gan Chye Huat* v. *Public*

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Prosecutor [1] and say that in the case before me the presumption applies and that the learned Magistrate should have called upon the respondent to make his defence on the 1st charge.

With reference to the 2nd and 3rd charges, I would say this, however, that the presumptions mentioned in section 144 would appear to be applicable only in proceedings for an offence under Part V of the Ordinance and would not, in my view, apply therefore in reference to the 2nd and 3rd charges, which appear to be in reference to offences under other parts of the Ordinance. I would, therefore, make no order as to the 2nd and 3rd charges.

This case will, therefore, go back to the learned Magistrate to be dealt with as I have directed above. The acquittal on the 1st charge is set aside.

Order accordingly.

Solicitors: *Lim, Lim & Oon.*

Re N. R. MISTRI, DECD.

[O. C. J. (Rose C.J.) October 23, 1962]

[Singapore — Originating Summons No. 132 of 1962]

Revenue — Corporation duty — Corporation Duty Ordinance (Cap. 159), s.3(2)(b) — Application of income or profits — Distinction between "application" and "appropriation" — Ambiguity.

The testator by his will devised and bequeathed all his residuary property upon trust for sale and conversion upon trust to divide the same into equal portions and to stand possessed in respect of one such portion in trust for certain named charitable organisations situate in Bombay called the "Mistri Bombay Trust" with directions to hold the corpus in perpetuity and to apply and pay the net income from time to time arising therefrom for such one or more of the named charitable organisations in such shares and portions and manner as the trustees shall in their absolute discretion think fit.

The trustees contended that as they were in Singapore and as the selection of the charitable organisations comprising the "Mistri Bombay Trust" was made in Singapore and as the trustees paid the income arising from the corpus of the "Mistri Bombay Trust" in Singapore such income or profits were applied in Singapore and therefore not liable to be charged with corporation duty under section 3(2)(b) of the Corporation Duty Ordinance (Cap. 159).

Held: on an ordinary and grammatical interpretation of section 3(2)(b) of the Corporation Duty Ordinance the words of restriction referred to "religious, educational or charitable purpose." There is a distinction between "application" and "appropriation" and the power of selection between named charitable organisations comprising the "Mistri Bombay Trust" did not amount to application of the income or profits envisaged by section 3(2)(b) of the Corporation Duty Ordinance.

ORIGINATING SUMMONS.

T. H. A. Potts for the trustees.

M. Karthigesu for the commissioner.

Koh Eng Tian (Crown Counsel) for the State Advocate-General.

Rose C.J.: By clause 7 of his will dated the 17th of July, 1952 the testator, Navroji Rustomji Mistri, left the residue of his property upon trust to divide the same into two equal portions and to apply the income thereof for charitable purposes, partly within the Colony of Singapore — as it then was — and partly for certain charities situated in Bombay. It is with regard to the latter portion, which the testator designated the "Mistri Bombay Trust" that the present matter turns.

The originating summons raises a question of interpretation of section 3(2)(b) of the Corporation Duty Ordinance (Cap. 159). Section 3(1) of the Ordinance imposes a corporation duty from which certain classes of property are exempted by subsection (2).

Subsection 3(2)(b) reads as follows:—

> " (2) The following classes of property shall be exempt from such duty:—
>
> (b) property which, or the income or profits whereof, is or are applied to any religious, educational or charitable purpose within the Colony or the Federation of Malaya."

It is, of course, not in dispute that the nine charitable institutions set out in clause 7(b) of the will are all situated in India and therefore cannot be said to be "within the Colony or the Federation of Malaya". Learned counsel for the trustees of the estate contends, however, that these words of restriction refer not to the charitable purpose mentioned in the paragraph but should be related to the word "applied."

In other words the question to be determined is not the location of the charities but the place where the funds are applied or appropriated — and learned counsel submits that for the purposes of this subsection the terms "applied" and "appropriated" are to all intents and purposes synonymous.

He goes on to submit that the place where the funds are applied in Singapore, because it is, in practice, in the offices of the Hongkong and Shanghai Bank (Malaya) Trustee Limited that the allocation of these funds to the various charities is made.

In the first place, I am disposed to consider that upon an ordinary reading of subsection 3(2)(b) the words of restriction should reasonably be held to refer to the "religious, educational or charitable purpose". That would be the grammatical interpretation and if it is the correct one it is sufficient to determine the matter.

If, however, there is force in the contention of learned counsel for the trustees that there is an ambiguity and that it is, at the least, permissible to relate the words of restriction to the word "applied", is the position really any different?

I prefer the view expressed by learned counsel for the Commissioner of Estate Duties that there is a distinction between "application" and "appropriation".

The trustees have the power of selection between the nine charities mentioned in clause 7(b) of the will. That selection, I accept, takes